2003

Deanna Pugh and Robyn Huffman v. Leslie Dozzo-Hughes : Petition for Rehearing

Utah Court of Appeals

Michael D. Hughes; Huges & Bursell; attorney for appellant .
Samuel G. Draper, attorney for petitioner; Deanna Pugh; pro se.

IN THE UTAH COURT OF APPEALS

DEANNA PUGH and ROBYN HUFFMAN, Petitioners and Appellees, vs. LESLIE DOZZ0-HUGHES, Respondent and Appellant.	Appellate No.: 20031026 District Ct. No.: 020502154 UTAH COURT OF APPEALS BRIEF UTAH DOCUMENT K F U 50 .A10 DOCKET NO. 20031026

PETITION FOR REHEARING OF APPELLEE DEANNA PUGH

Appeal from the Ruling on Motions for Summary Judgment of the
District Court of the Fifth Judicial District, State of Utah
The Honorable G. Rand Beacham, Presiding.

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Pursuant to Rule 35 of the Utah Rules of Appellate Procedure, Petitioner and Appellee Deanna Pugh, pro se, certifies this Petition for Rehearing is submitted in good faith and not for purposes of delay. I hereby submit the following arguments and facts for this Court's review

SUMMARY OF ARGUMENT

The Respondent and Appellant Dr. Dozzo-Hughes ("Wife") bases her case to disinter my son, Curtis Hughes, upon a statement in a note my son left to me, his mother. Dr. Dozzo-Hughes, however, gave testimony at the trial court level challenging the authenticity of the very note that she relies upon to disinter my son. In addition, Dr. Dozzo-Hughes acknowledged that the very wish she seeks to fulfill cannot legally be honored. This Court remanded the case back to the trial court for an evidentiary hearing to basically determine whether waiver occurred in this case, noting that neither party challenged the authenticity of the note. It is my argument that waiver is immaterial in this case because the wish the widow seeks to accomplish cannot legally be performed nor is it compelling to disturb my son's remains upon a note the proponent herself believes has been altered. The basic determining factor in every exhumation case is that there must be a compelling reason to disinter. Dr. Dozzo-Hughes does not provide a

compelling reason to disinter; therefore, the issue of waiver is immaterial in this case.

ARGUMENT

ISSUE NO. I: The Proponent of the Note, Dr. Dozzo-Hughes, Did in Fact Challenge the Authenticity of the Note.

This Court, in its opinion filed on May 5, 2005, under Footnote 2, stated: "On appeal, the parties do not dispute the Note's Authenticity." This Court, under paragraph 25, also stated the following: "Furthermore, even though the trial court was required to assume that the Note contained Decedent's wishes, it ruled that the Note was 'not material' to its decision, stating '[Wife]' has not given evidence that the [N]ote creates a binding, enforceable legal obligation to accomplish a cremation.'"

I now petition this Court to review the trial court's ruling and this Court's own ruling with the specific knowledge that Dr. Dozzo-Hughes herself testified that she doubts the authenticity of the Note and that this information was presented to this Court on appeal in my Brief of Appellee as well as at the oral argument. In the Brief of Appellee, on page 6, under "Statement of the Case," and again on p. 32, under "Issue No. 5," it was brought to this Court's attention that Dr. Dozzo-Hughes challenged the authenticity of the note. In fact, Dr. Dozzo-Hughes gave the following testimony at her deposition taken on January 31, 2003:

"[BY MR. FARRIS:]

Q. Do you have any doubt as to the authenticity of this Exhibit 1, this letter?

A. Yes, I do.

Q. What do you doubt about it? You don't think Curtis authored it?

A. I believe that this handwriting here is Curtis', but when you look at the typeset and the different fonts and things like that, I believe the note has been altered. But because I was not allowed to read the note in full, I don't know what might have been altered.

(See attached Addendum A-1, condensed pages 122-125 of Deposition of Dr. Dozzo-Hughes taken on January 31, 2003, highlighting page 123, line 25, through page 124, lines 1-10; see also Record Index 1196.)

It is my position that Judge Beacham, for purposes of summary judgment in this case, did view the facts and inferences to be drawn therefrom in a light most favorable to Dr. Dozzo-Hughes. Given Dr. Dozzo-Hughes' own testimony challenging the authenticity of the note and testifying that it is her belief that the note has been altered at the trial court level, as shown in Addendum A-1, this Court and Judge Beacham have the duty to view the note as not authentic and as a note that has possibly been altered, based upon the non-moving party's own testimony. Further, when testimony had been given by the Wife challenging the authenticity of the note prior to summary judgment, the Wife cannot simply

create new testimony to preclude summary judgment. Under Rule 56(e) of the Utah Rules of Civil Procedure, it states as follows:

> ". . . . The court may permit affidavits to be supplemented *or opposed by depositions*, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, *an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.*"

(emphasis added) Again, this Court, under paragraph 25, stated the following: "Furthermore, even though the trial court was required to assume that the Note contained Decedent's wishes, it ruled that the Note was 'not material' to its decision, stating '[Wife] has not given evidence that the [N]ote creates a binding, enforceable legal obligation to accomplish a cremation.'" Wasn't the trial court required to assume that the Note had been altered and possibly wasn't even authentic given the Wife's testimony at her deposition?

The motion for summary judgment presented to Judge Beacham that ultimately was granted by the trial court made no mention of the note, and the non-moving party did not provide the trial court with any evidence suggesting the note was authentic or that the note contained Curtis's wishes. Had the Wife in her memorandum in opposition to the motion for summary judgment or in her affidavit supporting her memorandum in opposition to

the motion attached the note and testified to its authenticity, I would have opposed this evidence by addressing the Wife's deposition testimony wherein she challenges the authenticity of the note. Judge Beacham in this case was not presented with the note by the Wife to weigh as material evidence, but he chose to address the note in his ruling even though neither party produced it for purposes of supporting or opposing summary judgment. In addition, for this Court's information, Dr. Dozzo-Hughes' deposition testimony challenging the authenticity of the note was taken one month after the evidentiary hearing was conducted by the first trial court judge, the Honorable James L. Shumate.

How could it be compelling to disinter my son based upon a note when the proponent of the note challenges its authenticity?

ISSUE NO. II: The Trial Court and Dr. Dozzo-Hughes Acknowledged That Fulfillment of Curtis's Wishes in the Note Would Be Illegal in New Mexico and Therefore Dr. Dozzo-Hughes Would Not Be Able to Fulfill His Wish Legally.

On September 9, 2003, Judge Beacham heard oral argument on both parties' motions for summary judgment. I now draw this Court's attention to oral argument made by Mr. William O. Kimball, the Wife's attorney, in opposition to my motion for summary judgment on September 9, 2003. As shown on page 68 of Volume II of the transcribed hearing, Mr. Kimball

stated the following: "I know that, in New Mexico, that – I don't believe you can put ashes in the – or at the Rio Grande River. And we'd try to honor that as much as possible, maybe a cemetery nearby or something to that effect." *(See attached Addendum A-2, with p. 68, lines 2-5, highlighted; see also Record Index p. 1199.)* Judge Beacham, on page 10, paragraph (e), of his Ruling on Motions for Summary Judgment dated October 28, 2003, points out the following: "Respondent acknowledges that she cannot fully comply with what she considers Mr. Hughes's wishes even if the body is disinterred and cremated, because laws governing the Rio Grande River would prevent her from spreading the ashes there." *(See attached Addendum A-3, Ruling on Motions for Summary Judgment dated October 28, 2003; see also Record Index p. 860.)*

Viewing the facts and inferences in a light most favorable to the Wife in this case does not create a compelling reason to disinter my son so that the Wife can place his ashes in "maybe a cemetery nearby or something to that effect." If you view the facts and inferences to be drawn therefrom, the Wife will have my son's body exhumed and cremated in order to place his ashes somewhere near the Rio Grande River over three years after burial in order to comply with a note my son left to me, a note the Wife does not believe is authentic.

ISSUE NO. III: The Issue of Waiver in This Case is Immaterial Since the Wish Cannot Be Legally Honored and Therefore the Note Provides No Compelling Reason To Disinter.

In this case the Honorable G. Rand Beacham was not persuaded that the Wife had identified any compelling reason to order Mr. Hughes's body disinterred. In addition, throughout this appeal, the Wife did not specifically challenge the trial court's determination there was no compelling reason to disinter but merely challenged the issue of waiver. As shown in the case of In re Estate of Moyer, 577 P.2d 108 (Utah 1978) and in all the other exhumation cases throughout the United States, the first and foremost issue to be considered in cases of disinterment is whether or not a compelling reason exists to disinter.

While the Utah Supreme Court made an additional determination of waiver in the Moyer case, the majority of exhumation cases do not address the issue of waiver but merely consider other factors revolving around the disinterment request, ultimately determining whether or not a compelling reason exists to disinter. While it is my position waiver occurred in this case, I argue that it is not necessary to remand this case to factually determine whether or not waiver occurred. I argue that the law set forth in the exhumation cases cited in this case by both parties requires a compelling reason to disinter only. However, if the court were to determine a

compelling reason exists, which this trial court did not, then the issue of waiver would become paramount to its decision-making process. Waiver is an important issue to be considered in opposition to disinterment, especially if there may be a compelling reason to disinter. If, on the other hand, the deceased's wishes cannot legally be honored or if the person seeking disinterment offers no compelling reason to disinter, then the issue of waiver becomes immaterial.

This Court ruled under Footnote 9 as follows: ". . . . However, that policy has to be considered in relation to the facts to be found by the trial court after receiving testimony and evidence from the parties." The trial court received evidence and testimony from the Wife that offered no compelling reason to disinter. The Wife testified that the note upon which she relies has been altered and doubts its authenticity, and the Wife also argues that it is against New Mexico law to spread my son's ashes in the Rio Grande River and therefore would place his ashes somewhere near there. If the note had been offered as evidence of my son's wishes to the trial court and if the Wife succeeded in proving its authenticity, my son's wish was not to be exhumed and cremated over three years later, nor was it my son's wish to have his ashes placed somewhere near the Rio Grande River. In essence, the Wife is seeking a judicial order to allow her to honor

my son's alleged wishes, to allow her to disobey the law. There is no compelling reason to disinter; therefore, waiver is an immaterial issue in this case.

CONCLUSION

Based upon the fact that the Wife testified that she doubts the authenticity of the note, that she believes the note has been altered, and that it would be illegal to place my son's cremated remains in the Rio Grande River, I respectfully request this Court reconsider its remand of this matter to the trial court for another evidentiary hearing. I respectfully request this Court reconsider the issue of waiver as it relates to this case, and that this Court uphold the Honorable G. Rand Beacham's ruling that there is no compelling reason to disinter my son. Please let him rest in peace.

DATED: June 14, 2005.

By: Deanna Pugh
DEANNA PUGH
Petitioner and Appellee Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of June, 2005, I mailed two copies of the foregoing Petition for Rehearing of Appellee Deanna Pugh to the following:

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Deanna Pugh
DEANNA PUGH

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her so much," why that was so important on that day, on March 6th, that I couldn't get a copy of it.

My God, my husband said he loved me and these people withheld that from me.

Q. You read the second paragraph?

A. Yes.

Q. And then there's also some handwriting, a handwritten -- actually, if we could label it, there's a first full paragraph, second full paragraph, a one-sentence third paragraph, a one-sentence fourth paragraph, and then some handwriting.

Did you read all of paragraph 2?

A. No.

Q. How far did you get?

A. "Because I love her so much." She pointed. She handed this back to me and she pointed at me where I was to read.

Q. Middle of the paragraph 2.

A. Yes. And then she took the note away from me again. I didn't read anything about any houses. I didn't know anything about anything. Then after she ripped the note out of my hands the second time, the daughter, Stacy, started talking about the Beck and Balcon homes, and I'm very confused because I haven't read this, and the Balcon home was mine before we got

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married.

Q. That's the one you were living in?

A. Yes.

Q. That's the place where the jumping jack was?

A. Yes. So I don't know what Deanna and Stacy are talking about, because I haven't read the note, and so --

Q. What happens then?

A. I believe that these people are going to be close to me and be honest with me and share with me and let me be close to them and us come together as a family, because it took this tragedy to finally get us together. That's what I believed.

Q. Then did they leave? Did you leave?

A. They left the warehouse and went back to Utah.

Q. Steve remains?

A. I don't remember.

Q. Do you have any -- subsequently, you've had a chance to read the entire note that he left, correct?

A. Yes.

Q. When did you first have that opportunity?

A. Last summer.

Q. Do you remember approximately when?

A. July or August.

Q. Do you have any doubt as to the authenticity of

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this Exhibit 1, this letter?

A. Yes, I do.

Q. What do you doubt about it? You don't think Curtis authored it?

A. I believe that this handwriting here is Curtis', but when you look at the typeset and the different fonts and things like that, I believe the note has been altered. But because I was not allowed to read the note in full, I don't know what might have been altered.

Q. Have you looked for -- do you know -- how many computers did you have?

A. I've looked through every computer that Curtis had access to.

Q. And found --

A. No.

Q. Did he have a typewriter?

A. I don't know. Curtis took many of his belongings and gave them to his family members.

Q. When did he do that?

A. I don't know.

Q. How did you discover that?

A. Every once in awhile you go through the house and you notice something's gone.

Q. Like?

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A. A bread maker.

Q. Who has the bread maker?

A. I have no idea.

Q. You just know it's gone?

A. Yeah.

Q. How do you know it went to his family? What makes you suspect that it went to his family?

A. Because his truck was loaded down with things and --

Q. Is this the day where Holly's things were in the back of his truck or is this a different time?

A. There are two trucks, the Budget truck and Curtis' truck.

Q. Which is the truck that he had Holly's belongings in?

A. His truck.

Q. And you're saying there was belongings in the Budget truck?

A. Yes.

Q. When had he loaded those into the Budget truck?

A. I have no idea.

Q. When did you discover he had belongings in the Budget truck?

A. After he died.

Q. How did you discover that?

finally got a copy of the note from Mrs. Pugh.

Now, they're going to bring up that Mrs. Pugh, or the petitioner, showed part of the note to my client, which is true, Your Honor. She showed her the first paragraph, or part of the first sentence, then yanked the note away and pointed her to a certain section that says, "I love you," and there's certain terms regarding my client.

Now, she didn't know he wanted to be cremated until she received a copy of the note during the summer of 2002.

THE COURT: Okay. But none of this establishes any legal basis for the Court to make an order regarding that. It explains your client's preference as in the reasons for her current request or current intention. But that doesn't establish her right to do that. And that's why I use the cannon and the Bering Strate idea.

MR. KIMBALL: I understand, Your Honor. The only reason I was bringing that up is to help the Court understand that my client isn't doing this out of spite or on a whim. This is very important to her. In fact, it's been very emotionally damaging to her. And she's essentially just trying to honor the wishes of her deceased husband, at a great expense. And it's our position, Your Honor, that, under New Mexico law, the respondent can honor her husband's -- her deceased husband's wishes for burial to

the extent allowable by the law.

I know that, in New Mexico, that -- I don't believe you can put ashes in the -- or at the Rio Grande River. And we'd try to honor that as much as possible, maybe a cemetery nearby or something to that effect. But -- and they're going to bring up the Smart case, Your Honor.

In the Smart case, it's completely different than the present case. This person died, I believe had been with a clergy person, and the clergy person had a copy of the will. And so he was aware that his person wanted to be buried a certain way, wanted to be cremated in this case. And after the death, he didn't exercise that authority, he-- well, it's in dispute still. But he knew of that desire and he didn't honor it. And the court found that the body shouldn't be interred -- it shouldn't be taken out of the ground again because this person was aware, as the executor, that the person wanted to be cremated, that the decedent wanted to be cremated in the Smart v. Moyer case.

And that's essentially, besides the statute enacted on May 5th, 2003, this is the only Utah law that is remotely on the subject. In this case, it's a spouse trying to honor the wishes, Your Honor. And, again, she wasn't aware of what he wanted to take place. She didn't find out until the summer of 2002 that he wanted to be cremated and spread over a river. And she feels really very wronged,

Your Honor, because that was held back from her as a spouse.

THE COURT: Well, let's put something else on the table. Considering the subject matter, it's difficult to be indelicate about this but, frankly, this only makes a difference to your client. There could be no evidence that it matters at all to the decedent anymore. It did at one time, perhaps, but there's not going to be any evidence beyond that.

Your client did what she was satisfied with at the beginning; now she's not satisfied with it. But it's really her own discomfort that's involved here, isn't it? There's nothing else at stake.

MR. KIMBALL: Your Honor, the decedent's daughter who is also located in New Mexico and his ex-wife, who is somewhat close, also has an interest. And she was named in here, but she hasn't been part of this litigation process.

But, yeah, they want -- they want the body to stay here, Your Honor, the decedent's parents, the siblings want the body to stay here. However, under statutory law --

THE COURT: Well, but they're not the ones -- they're not the ones to -- suggesting there be -- be a change. That's my point. But for your client's discomfort because of a late-discovered note of some sort, there wouldn't be anything going on here.

MR. KIMBALL: You're correct, Your Honor. Had she

known about his wishes, it's our position she would have honored his wishes, as the spouse and as the statute allows her to do.

THE COURT: Right.

MR. KIMBALL: And so as --

THE COURT: But she didn't know about it.

MR. KIMBALL: She didn't.

THE COURT: And it's hard for me to understand what the motivation is, then, to go on. It's simply a "wish I'd have done that." But, jeez, I wish I'd done a lot of things when I didn't know something that I later learned. We all do that. And that's called life. Things happen, we deal with them at the time, we later learn more and we look back and say, "Well, I wish I'd done that differently."

But aren't we just dealing with something like that for your client?

MR. KIMBALL: It's a little more than that, Your Honor. She was deceived. They kept the knowledge from her. It was kind of a family conspiracy, it's our position, and that --

THE COURT: Well, what evidence is there of that?

MR. KIMBALL: Well, we haven't got into that because it's still our position, Your Honor, that the law allows her to do this as the spouse.

THE COURT: Okay. I see.

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IN THE FIFTH DISTRICT COURT FOR
WASHINGTON COUNTY, STATE OF UTAH

DEANNA PUGH, Petitioner, vs. *LESLIE DOZZO-HUGHES, et al,* Respondents.)	RULING ON MOTIONS FOR SUMMARY JUDGMENT Civil No. 020502154 Judge G. Rand Beacham

This matter came before the Court pursuant to motions for summary judgment filed by Petitioner Deanna Pugh (hereafter "Petitioner") and Respondent Leslie Dozzo-Hughes (hereafter "Respondent"). The Court heard oral arguments at a hearing on September 9, 2003, and instructed the parties thereafter to submit courtesy copies of their memoranda and affidavits, copies of relevant case law, and a notice to submit for decision. Having read the memoranda, statutes and case law, having heard the arguments, and having reviewed the file for this action, the Court rules as follows:

COMPLIANCE WITH RULE 4-501

Respondent's motion was filed first. The "Statement of Facts" of Respondent's supporting memorandum cites only one source: Portions of the "Background" section of Judge Shumate's May 19, 2003 "Ruling on Rule 59(e) Motion to Alter or Amend Judgment." Although Respondent treats the "Background" section as if it consisted of findings of fact,

that is incorrect. The "Background" section appears to this Court to be simply a recitation of the allegations relevant to the issues raised by the pleadings. It is particularly telling that the "Background" statements upon which Respondent relies are irrelevant to Judge Shumate's actual ruling that the Order Granting Permanent Injunction was vacated. Consequently, Respondent's motion for summary judgment lacks a sufficient factual basis.

Petitioner's motion for summary judgment is supported by a memorandum with a "Statement of Facts" in proper form and with clear references to the record of this case. Petitioner has complied with Rule 4-501 for a supporting memorandum. Petitioner also styled her memorandum as one opposing Respondent's motion, however, and in this regard it fails to meet the requirements of Rule 4-501.[1] If Respondent's memorandum had complied with the rule, Respondent's statements of fact would have been deemed admitted for purposes of summary judgment. See, e.g., Fennell v. Green, 2003 UT App 291.

Respondent's memorandum in opposition to Petitioner's motion did identify the paragraphs of Petitioner's statement of facts which Respondent disputes. Respondent's original formal error was corrected in her post-hearing reply memorandum. The specific disputes identified in Respondent's memorandum, however, consist mainly of argument and immaterial facts and are not sufficient to raise any particular genuine issue of material fact.

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[1]This is a common problem when parties file competing motions for summary judgment. In an effort to be efficient, the parties file dual-purpose memoranda which, in spite of best intentions, are inevitably inadequate for one purpose or the other. This Court cannot recall ever seeing a memorandum which adequately constituted both a supporting memorandum and an opposing memorandum.

Petitioner's reply memorandum correctly notes many of these deficiencies.

As a result, the facts which this Court finds to have been adequately presented are taken primarily from Petitioner's supporting memorandum, with some additions from Respondent's reply memorandum.

FACTS

Some of the facts asserted by the parties, and properly supported, are irrelevant to the Court's decision; for example, the Court finds no relevance in the fact that each party paid for the services of the mortuary hired by that party. The Court finds that the following relevant and material facts have been established without genuine issue:

1. Petitioner is the mother of Mr. Curtis Hughes, who died on February 28, 2002 in Albuquerque, New Mexico of cyanide poisoning, an apparent suicide.

2. Respondent is the surviving spouse of Mr. Hughes, and had been married to him about 11 months before his death.[2]

3. On February 12, 2002, Mr. Hughes left a voice mail message for Respondent in which he said he was going to kill himself and that he would like to be cremated and have his ashes spread over the Rio Grande River.

4. Mr. Hughes phoned Respondent again about a half hour later, and stated that

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[2]There was a suggestion in the arguments that Respondent and Mr. Hughes were separated and not on good terms at the time of his death, but neither party's memorandum established such facts.

he did not mean what he said; Respondent, who is a mental health professional,[3] interpreted Mr. Hughes's two phone calls to be "a ploy to get attention," such as she commonly encounters in her profession.

5. After Mr. Hughes's death on February 28, 2002, Respondent hired French's Mortuary to receive the body from the Medical Examiner's Office in Albuquerque. On about March 2, 2002, French's Mortuary took charge of the body under Respondent's instructions to prepare the body and have a funeral service for Mr. Hughes in Albuquerque.

6. At about the same time, Petitioner hired Metcalf Mortuary to transport the body from Albuquerque to St. George, Utah for a second funeral service and the interment in a burial plot there. Respondent consented to the Utah funeral and interment.

7. A funeral service was held in Albuquerque on March 5, 2002, after which Respondent allowed the body to be taken to Utah by Metcalf Mortuary for the second funeral service and burial, which were conducted on March 8, 2002 and were attended by Respondent. Respondent gave no indication that she thought the burial in Utah was to be temporary.

8. At the time of his death, Mr. Hughes apparently left a note for Petitioner, making some reference to being cremated and having his ashes spread over the Rio Grande

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[3]Neither party's statement of facts covers this fact, but the Court has gathered this from their discussion.

River in accordance with his voice mail message to Respondent.[4]

ANALYSIS

Respondent seeks the Court's order allowing her to have the body disinterred and transported back to New Mexico for cremation, asserting that she is certain that this was Mr. Hughes's wish. Respondent apparently relies upon Mr. Hughes's voice mail message, which she did not believe at the time, and upon Mr. Hughes's note, the contents of which are not in evidence before the Court.

1. Funeral Services Licensing Act.

Respondent argues that she alone is entitled to determine whether the body will be disinterred, under the authority of Utah Code Ann. §58-9-602. This statutory provision is part of the current version of the Funeral Services Licensing Act (hereafter the "Act") which first became effective May 5, 2003, more than one year after the subject burial, and it now sets the priorities of persons who are vested with the "right and duty to control the disposition of a deceased person." The earlier version of the Act, which was effective at the time of the subject burial, had no comparable provision.

Respondent argues that the new provisions of the Act should be applied retroactively, but the Act does not so provide. In the absence of an express declaration of retroactivity,

[4]The parties disagree about when Respondent first saw the note, but the Court finds this to be immaterial to the Court's decision. In fact, neither party has given the Court a copy of the note or the details of its contents.

statutes are not to be applied retroactively. Utah Code Ann. §68-3-3. Furthermore, the Court knows of no basis for concluding that the absence of a comparable provision in the former Act evinces a legislative intention that the new Act be applied retroactively. Consequently, Respondent's argument is not persuasive.

Furthermore, the Court is not persuaded that Section 602 of the Act would be controlling in this case even if it applied retroactively. Section 602 specifically controls the "right and duty to control the disposition of a deceased person." "Disposition" is defined in the Act as "the final disposal of a dead human body" by any of six specific means or "other lawful means." Utah Code Ann. §58-9-102(7). Both "earth interment" and "cremation" are defined as means of "disposition," but nothing in the Act indicates that Section 602 gives any person a continuing or perpetual right to choose more than one disposition of one body. Consequently, the Court is not persuaded that the serial dispositions sought by Respondent are authorized by the Act, even in its current form.

2. New Mexico Law.

Respondent argues that the Court should apply the law of New Mexico to determine that she has a right to disinter the body from Utah and dispose of it in New Mexico. The argument that New Mexico law gave Respondent rights to the original disposition of the body would likely have been correct if made before the body was interred in Utah, but now it is too late. The issue is no longer whether Respondent had such rights regarding

disposition. The issue is whether Respondent can now obtain permission for disinterment from a grave in Utah, and Utah clearly has the most significant relationship to that issue. Disinterment of a body from a grave in Utah is a matter for Utah law. *See, e.g.*, Utah Code Ann. §26-2-17, §26-4-12, and §76-9-704.

3. Waiver of Respondent's Rights.

Petitioner argues that Respondent waived any right to dispose of the body by cremation when she agreed to the burial in Utah. Respondent counters that she was not aware of Mr. Hughes's wishes until she learned of his note to Petitioner. Petitioner argues that Respondent saw the note before the burial, and Respondent argues that she did not. The Court finds this to be immaterial.

Whatever the contents of the note may be, Respondent has not given evidence that the note creates a binding, enforceable legal obligation to accomplish a cremation. Regardless of when Respondent learned of Mr. Hughes's note to Petitioner, the note does not create a legal right in Respondent which she did not already have, if any. The note constitutes simply (i) another expression of Mr. Hughes's wishes, contrary to his last expression to Respondent, and (ii) Respondent's explanation for her change of mind about the burial, which the Court finds to be a good faith explanation.[5] Furthermore, considering Mr. Hughes's vacillation as

[5]Respondent has not explained, however, why she now chooses to believe the note over Mr. Hughes's statement to her that he did not mean what he had said in his voice mail, or why she should rely to any extent on the statements of a person whose mental condition had obviously deteriorated to the point of suicide.

to his wishes, Respondent cannot say that the purported contents of the note were a clear and unequivocal expression of Mr. Hughes's wishes. Consequently, the note is not material to the Court's decision.

The fact remains that Mr. Hughes informed Respondent of his wish to be cremated before his death, and Respondent, in apparent good faith, either chose not to believe him or chose not to comply with his wishes. Respondent could have chosen to have the body cremated in accordance with the wishes Mr. Hughes once expressed to her. Having chosen to allow the body to be buried in Utah, instead of being cremated and disposed of in New Mexico, Respondent waived any right to choose another form of disposition. *Cf.* In re Estate of Moyer, 577 P.2d 108 (Utah 1978).

4. Public Policy Regarding Disinterment.

The case just cited states: "It is therefore a sound and well-established policy of the law that a person, once buried, should not be exhumed except for the most compelling of reasons." Id. at 110-111. This Court does not read the new provisions of the Funeral Services Licensing Act to change that policy, since the Act only establishes the priorities of persons who may chose the method of disposition of a body.

The Moyer case was preceded by Silver King Coalition Mines Co. v. Industrial Commission, 115 Utah 336, 204 P.2d 811 (Utah 1949), in which the Utah Supreme Court quoted with approval the following policy language from a Corpus Juris Secondum article:

> There is a distinction between the rights existing prior to burial and those after burial, because after its interment the body is in the custody of the law and a disturbance of its resting place and its removal is subject to the control and direction of a court of equity in any case properly before it. It is the policy of the law, except in cases of necessity or for laudable purposes, that the sanctity of the grave should be maintained, and that a body once suitably buried should remain undisturbed; and a court will not ordinarily order or permit a body to be disinterred unless there is a strong showing that it is necessary and that the interests of justice require it. However, there is no universal rule applicable, each case depending on its own facts and circumstances; and for a valid reason, upon application by a proper person, the removal of a body will be permitted.

Id. at 813 (emphasis added).

The Moyer case was relied upon by the Court of Appeals of Ohio in Spanich v. Reichelderfer, 628 N.E. 2d 102 (Ohio App. 1993), and that court's expression of the reasons for the policy restricting disinterments is powerfully persuasive on this issue. The opinion examines the several factors which courts have considered with respect to requests for disinterment of bodies, and this Court has considered those factors in relation to this case and finds them generally to support Petitioner's arguments. For example, the Court has considered the following:

a. While Respondent had the closest legal relationship to Mr. Hughes, it is suggested (without contradiction) that they were separated at the time of his death, so her personal interest is weaker than it might have been.

b. Petitioner's relationship to Mr. Hughes is the closest recognized in the law, except that of a surviving spouse.

c. Mr. Hughes's expressions of his wishes were contradictory at best, and his mental condition was not good at the time, so his true wishes cannot be determined with any certainty.

d. Respondent consented to the burial in Utah, and her suggestion that she was under pressure from Petitioner is not supported by evidence before the Court.

e. Respondent acknowledges that she cannot fully comply with what she considers Mr. Hughes's wishes even if the body is disinterred and cremated, because laws governing the Rio Grande River would prevent her from spreading the ashes there.

Ultimately, this Court is not persuaded that Respondent has identified any compelling reason to order Mr. Hughes's body disinterred.

CONCLUSION

There is no genuine issue of material fact, and Petitioner is entitled to judgment as a matter of law. Petitioner's motion for summary judgment is granted and Respondent's motion for summary judgment is denied. Accordingly, a permanent injunction shall be issued, enjoining the disinterment of the body. Petitioner's counsel is hereby directed to submit an appropriate judgment and permanent injunction pursuant to Rule 4-504. A copy of this Ruling shall be attached to the judgment and incorporated therein by reference.

Dated this 28 day of October, 2003.

G. Rand Beacham

G. RAND BEACHAM, JUDGE

CERTIFICATE OF MAILING OR HAND DELIVERY

I hereby certify that on this 29th day of Oct, 2003, I provided true and correct copies of the foregoing RULING to each of the attorneys/parties named below by placing a copy in such attorney's file in the Clerk's Office at the Fifth District Courthouse in St. George, Utah and/or by placing a copy in the United States Mail, first-class postage prepaid, and addressed as follows:

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